

JAN 24 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

No. 77-845

POTOMAC EDISON COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

PETITIONER'S REPLY MEMORANDUM

ALAN P. BUCHMANN
Squire, Sanders & Dempsey
1800 Union Commerce
Building
Cleveland, Ohio 44115

ROBERT B. MURDOCK,
Vice President
The Potomac Edison
Company
Downsville Pike
Hagerstown, Maryland
21740

RICHARD S. WEYGANDT,
Vice President
Monongahela Power
Company
1310 Fairmont Avenue
Fairmont, West Virginia
Attorneys for Petitioner,
POTOMAC EDISON COMPANY.
EDWARD W. COCHRAN
1800 Union Commerce
Building
Cleveland, Ohio 44115

ARNOLD O. WEIFORD, ESQ.
CLEMENT R. BASSETT, ESQ.
State Capital Building
Charleston, West Virginia
25305

Counsel for Respondent,
PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA

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**1. The Issue Of Petitioner's Constitutional Right To
The Independent Judgment Of A Court Of Law
Was Raised In The Court Below.**

In Potomac Edison's Petition for Certiorari, one of the reasons cited for granting the Writ is that West Virginia Code Section 24-5-1 is unconstitutional because it does not provide for an independent judgment as to both law and facts by a court of law as required by the due process clause of the Fourteenth Amendment. *See Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287 (1920). In its brief opposing *certiorari*, the Public Service Commission alleges in Section III of its argument that Potomac Edison did not raise the issue of the constitutionality of Section 24-5-1 in its appeal to the West Virginia Supreme Court of Appeals,

and that therefore, *certiorari* should be denied. On the contrary, the basic issue — a regulated utility's right, as a matter of constitutional law, to the independent judgment of a court of law — was raised before the Supreme Court of Appeals both in petitioner's brief and in oral argument.

The West Virginia Supreme Court of Appeals was fully aware of the essential question. In its Petition For Appeal, Potomac Edison expressly pointed out that, in exercising its review powers under that statute, the Court was *required* by the due process clause of the Fourteenth Amendment to make an independent judgment as to both the law and the facts of the case. See page 16 of Potomac Edison's Note of Argument to the West Virginia Supreme Court of Appeals, attached hereto as Appendix A. There is no question but that this issue is properly before this Court.*

Potomac Edison could not, of course, have in express terms, raised the unconstitutionality of Section 24-5-1 before the West Virginia Supreme Court of Appeals because it had no standing to raise that issue *at that time*. This Court has made it clear that a party has no standing to challenge a statute as unconstitutional unless that party has suffered "injury in fact" due to the operation of the statute. *Association of Data Processing Service Organization v. Camp*, 397 U. S. 150 (1970). At the time Potomac Edison filed its Petition For Appeal with the West Virginia Supreme Court of Appeals, pursuant to Section 24-5-1, it had not been injured in fact because it had not yet been

*The federal cases discussed by respondent, in which petitioner sought to at least stay the West Virginia Commission's refund order pending appeal (which the Commission and the Supreme Court of Appeals declined to do — an example of West Virginia "due process") turned on a jurisdictional issue, as can be readily seen. The holding is that the Johnson Act, 28 U. S. C. § 1342, "precluded Federal jurisdiction."

denied the independent judgment of the West Virginia Supreme Court of Appeals as to both the law and the facts of this rate case. Obviously, Potomac Edison was not injured *in fact* until the Supreme Court of Appeals denied its Petition For Appeal. Until that time, the Supreme Court of Appeals could have granted the Petition For Appeal and properly reviewed the case.

Since Potomac Edison could not have challenged the constitutionality of Section 24-5-1 before the West Virginia Supreme Court of Appeals, its alleged failure to do so cannot constitute a waiver. A person cannot waive a right before he is in a position to assert it. *Chambers & Co. v. Equitable Life Assurance Society*, 224 F.2d 338, 345 (5th Cir., 1955).

2. The West Virginia Commission, Which The Court Below Declined To Review, Failed, And Still Fails, To Comprehend The Economic Issue.

Respondent goes to considerable length, outside the record in this proceeding, to demonstrate that Potomac Edison's coverage ratios are such that it can issue debt. It then asserts "it is a mystery . . . why Potomac would allege" to this Court that it cannot issue first mortgage bonds. Potomac Edison made no such allegation to this Court, the court below, or the West Virginia Commission. It never claimed that it could not issue first mortgage bonds in 1977, and as a matter of fact it has, although the amount which could be issued was limited. What it asserted was that the coverage ratios were and would be such that it would not be able to issue senior securities in the near future in order to support its construction program. It is clear that the revenues granted by order of the Commission, as indicated by the following coverages, are insufficient to enable Potomac Edison to maintain and support

its credit. Potomac Edison's correct debt coverage for the last three years, restated and excluding West Virginia revenues subject to refund were:

1975	3.07
1976	2.67
1977°	2.21

More important, perhaps, although respondent makes the rather serious charge that Potomac Edison "is playing games" with the Commission and the courts, respondent makes no mention of the coverages with respect to *preferred stock*. Keeping in mind that in the case of preferred a coverage of 1.5 times is required, the coverages for the last three years, on the same basis as the debt coverages already stated, were as follows:

1975	3.07
1976	2.67
1977°	2.21

It must also be remembered that, whether we are speaking of first mortgage bonds or preferred, the required coverages must exist not only for the month in which the financing is to take place — and *not* for some future period, as respondent seems to imply—but rather for 12 consecutive months within 15 months *preceding* the proposed issue. That is, it is not sufficient to have coverages at a particular point in time; they must be *sustained* and for a *past* period. And, finally, the mere fact that the Company has coverages of 2.0 times (for debt) or 1.5 times (for preferred) does not mean that it can reasonably finance. These are the *legal minimum* requirements which must be met in order to permit the Company to *legally* issue securities. Indeed, it does not even necessarily permit the Company to legally finance, since the 2.0 times test must be met on a *pro forma*

*Subject to audit.

basis, i.e. including in the denominator the annual interest required on the securities to be issued. Obviously, for the Company to maintain and support its credit and raise the money necessary for the proper discharge of its public duties, *Bluefield Waterworks and Improvement Company v. Public Service Commission*, 262 U.S. 679, 693 (1923), requires substantially more than merely meeting minimum legal requirements. Thus, respondent's Brief in Opposition, which refers to these *legal* requirements as "only an indicator," reflects the same lack of understanding which the Commission evidenced in its orders and in its briefs below.

Furthermore, the Commission's suggestion that a very recently filed West Virginia rate case would solve these problems is specious. We have no idea when that case will be decided. In any event, each rate case must stand or fall on its own record and since coverages are measured by a past period, each year's construction program and the ability of the Company to attract capital must be based on historical revenues, not future possibilities.

CONCLUSION

The issues presented in this and the companion petition for *certiorari* of Monongahela Power Company are serious and have wide implications not only for the petitioners, but for their customers, including the customers which they serve in states other than West Virginia.

The Commission has affirmatively refused to authorize petitioner sufficient revenues to enable it to maintain its credit and to attract capital. The Supreme Court of Appeals of West Virginia has refused *to even consider the question on its merits*. This Court is, in this case, truly a court of last resort for petitioner and the thousands of people which it serves and hopes to continue to serve in the future. We are advised that similar issues have been raised on appeal

by Appalachian Power Company, yet a third electric utility regulated by the West Virginia Commission which, we submit, demonstrates that the Commission's approach to the principles laid down by this Court in the *Bluefield* and *Hope* cases is not an isolated instance arising out of circumstances peculiar to this petitioner.

The petition should be allowed.

Of Counsel

ROBERT B. MURDOCK,
Vice President
THE POTOMAC EDISON
COMPANY
Downsville Pike
Hagerstown, Maryland
21740

Respectfully submitted,

ALAN P. BUCHMANN
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200

Attorneys for Petitioner,
THE POTOMAC EDISON COMPANY.

RICHARD S. WEYGANDT,
Vice President
Monongahela Power Company
1310 Fairmount Avenue
Fairmount, West Virginia
26554

EDWARD W. COCHRAN
1800 Union Commerce Bldg.
Cleveland, Ohio 44115

APPENDIX A

court" with respect to matters such as rates "over which the public service commission was then given jurisdiction."

Shortly after the Howell decision, the Supreme Court of the United States, in its review of the decision of the Supreme Court of Appeals of West Virginia in the celebrated landmark Bluefield case (*Bluefield Waterworks and Improvement Company v. Public Service Commission*, 89 W. Va. 736, 110 S.E. 205, certiorari denied 42 S. Ct. 315, 258 U.S. 622, 66 L. Ed. 796 and reversed 43 S. Ct. 675, 262 U.S. 679, 67 L. Ed. 1176, PUR 1923 D 11) stated unequivocally (PUR 1923 D at page 17) that:

"Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, P.U.R. 1920 E. 814, 64 L. Ed. 908, 40 Sup. Ct. Rep. 527."

The *Ben Avon* case cited by the Supreme Court in the Bluefield decision has often been stated to be final authority for the proposition that a reviewing court has the constitutional obligation to review the findings of a public service commission and to give its independent judgment on both facts and law in any case where question of constitutional confiscation is alleged. While the West Virginia Court has never squarely based its reason for review of a public service commission decision on the holdings of the *Ben Avon* or *Bluefield* cases, the practical result has been that the Court has, in most instances, followed the mandate of the Bluefield case, and at least tacitly acknowledged the rule when it stated in *Natural Gas Co. v. Public Service Commission*, (1924) 95, W. Va. 557, 121 S.E. 716, 723 that:

"...We are asked by the Company to exercise our independent judgment upon the evidence and determine the rate base. This we would do if we had sufficient facts before us. *We are not disposed at any time to shirk our duty*..."